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EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th St. SW
Washington, D.C. 20554

Re: AT&T Petition For Declaratory Ruling Regarding "Enhanced" Prepaid
Card Services, WC Docket No. 03-133

Dear Ms. Dortch:

BellSouth writes this letter to respond to AT&T's improper characterizations related to its prepaid calling card services. Very similar to its attempt to have the Commission relieve it of access charge obligations with its Internet Protocol ("IP")-in-the-middle petition, AT&T here unilaterally chose to stop paying appropriate access charges, as well as universal service and, we believe, TRS obligations from prepaid card telephone calls.¹ And again as with its IP-in-the-middle, AT&T subsequently filed a petition with the Commission as a superficial mechanism to rationalize its prior self-help. And in the ultimate similarity with its IP-in-the-middle effort, AT&T's legal arguments in support of its prepaid calling card self-help are specious, leaving it to resort to wrapping itself in rhetorical patriotism and protector of the underserved. Just as the Commission correctly denied AT&T's attempt to avoid its obligations regarding IP-in-the-middle, the Commission must act quickly to reject AT&T's latest self-help efforts before they severely undermine the existing universal service and access regimes.²

¹ AT&T's admissions of non-payment have been limited to Universal Service and access charges. However, since TRS assessments are based upon the same revenue reporting information as for federal universal service, there is no reason for the Commission not to assume that AT&T has failed to contribute to TRS for its revenues from these pre-paid calling cards as well.

² *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, AT&T Petition for Declaratory Ruling (filed Oct. 18, 2002); *Order*, 19 FCC Rcd 7457 (2004).

* * * * *

[B]ecause our prepaid card calls are offered as an enhanced service, *we do not make Universal Service Fund (USF) contributions on revenue derived from these calls*. Given that we cannot predict with certainty how the FCC will rule on our petition . . . *the current classification of AT&T's enhanced prepaid card service has generated approximately \$215 million in access savings since the third quarter of 2002, and approximately \$140 million in USF contribution savings since the beginning of 1999, compared with the cost that would have been incurred by a basic prepaid card offering.*

AT&T Corp., Form 10-Q, Section 10 (filed May 10, 2004)(emphasis added).

I. Prepaid Calling Card Calls Are Telecommunications Services, Not Information Services.

AT&T goes to great lengths to attempt to convince the Commission that its placement of an unsolicited advertisement on its calling card platform converts the service offered and delivered to the consumer from a telecommunications service to an information service. AT&T's arguments fail even the "straight-face" test.

A prepaid calling card is merely a means of billing for a telephone call. Indeed, the only difference between a call placed by a prepaid card and 1+ dialing is the timing of payment for the call. Thus, AT&T is not offering an information service to its prepaid calling card customers; it is offering a convenient method of paying for telecommunications services. The fact is that no one purchasing the prepaid cards is buying them to hear the advertisements. Indeed, it is doubtful that a prepaid card customer is even aware when purchasing the card that his call will be delayed by an advertisement.

One need look no further than the statutory definitions to see that AT&T's position is unsustainable. The Act defines a telecommunications service as:

the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.³

Telecommunications is defined simply as:

³ 47 U.S.C. § 153(46).

the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.⁴

And, the Act defines an information service as:

the *offering* of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.⁵

As stated, a prepaid calling card is a means of making a telephone call, the most basic of telecommunications services. Thus, no matter how AT&T may try to disguise the facts, there is no doubt that it is not offering, and the customer is not purchasing, the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." Just as a consumer does not purchase a product for the packaging, but instead is purchasing the product itself, consumers do not purchase AT&T's, or for that matter any carrier's, prepaid calling cards for the advertisements. The advertisement is merely an annoyance that the customer must endure in order to obtain the service he or she is purchasing – if the customer had the choice, he or she would no doubt bypass the advertisement and go straight to the telephone call. The bottom line is, AT&T is offering, and the customer is purchasing, the capability to make a telephone call, and that is nothing more than a telecommunications service.⁶

The fallacy of AT&T's position is underscored by the fact that, if accepted, *all toll calls (not to mention local calls)* could instantly become "information services" simply by imposing a one-second "commercial" on the customer during call set up before completing the call. To be sure, AT&T could completely escape all Title II regulation, including contributing to universal service, by doing just this with all of its toll traffic. One wonders if AT&T's position is that its branding of toll calls—the "Bong-AT&T"—before completing them turns all such calls into information services? The distinction between

⁴ 47 U.S.C. § 153(43).

⁵ 47 U.S.C. § 153(20) (emphasis added).

⁶ AT&T relies on a prior Commission order to support its position that instead proves just what BellSouth describes above. In the *Talking Yellow Pages Order*, a company, Teleconnect, offered a service to customers that allowed the customers to call a number and hear recorded advertisements. The capability to hear this information was the service the company was offering and the consumer was seeking to obtain. Under this set of facts, of course the service was an information, or enhanced, service. This case is inapposite to AT&T's prepaid card, however, for the reasons discussed above. Teleconnect was only offering customers the capability to obtain information – the advertisements; the advertisements were not simply a tangential by-product of the telecommunications service it was offering. *Northwestern Bell Telephone Company Petition for Declaratory Ruling, Memorandum Opinion and Order*, 2 FCC Rcd 5986 (1987) ("Talking Yellow Pages Order").

this and its “advertisement” on pre-paid calling cards is certainly not obvious since the branding is providing the caller “information” as to the company completing the call.⁷ Given AT&T’s unilateral self-help conduct here and in the IP-in-the-middle proceeding, there is good reason for the Commission to presume that AT&T will soon start withholding USF, access and TRS payments for a much broader array of calls—if they have not done so already—in the absence of a clear rejection of this argument by the Commission.

II. Jurisdiction Is Determined By the Origination and Termination of the Call

AT&T’s other legal argument—that calls using its prepaid card are always interstate subject to interstate access—is patently inconsistent with its “information services” argument, but no more persuasive. Moreover, this argument completely fails to excuse AT&T’s forced admission that they have not paid universal service support on these calls.

Under well-established Commission precedent, the jurisdiction for these calls is determined by the origination and termination points of the call. Simply put, if the calling party originates the call in one state and the call is terminated to the called party in another state, then the call is jurisdictionally interstate.⁸ If, however, the calling party and the called party are in the same state, then the call is jurisdictionally intrastate regardless of how the underlying call is routed by the carrier. Indeed, the Commission has “determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any

⁷ Verizon also pointed out this impact on telecommunications services if the Commission followed AT&T’s logic. (See Letter from Ann Rakestraw, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-133, at 7 (July 15, 2004) AT&T attempted to dismiss this proposition on the basis that its prepaid card delivers a communication, “sought and approved by the third party (who is *not* AT&T)” to the cardholder, while a “thank you for using Verizon” would only be a confirmation that the end-user “has connected with the carrier she expected to use....” This explanation, however, is a difference without a distinction. Moreover, even if one accepted AT&T’s explanation, if the Commission were to change its rules and grant AT&T’s petition then all any carrier would need to do is begin soliciting companies for advertising purposes. Thus, any call – toll or otherwise – could be converted to an information service merely by inserting a phrase such as “remember to use XYZ Company for all your home repair needs” into the call set up. AT&T cannot have it both ways; if such an advertisement would transform a call using a prepaid calling card into an information service then it would likewise transform any call into an information service.

⁸ *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, Memorandum Opinion and Order*, 7 FCC Rcd 1619, 1621, ¶ 12 (1992) (“The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology.”); *Teleconnect Company. v. Bell Telephone Company of Pennsylvania, et al*, File Nos. E-88-83, *et al.*, *Memorandum Opinion and Order*, 10 FCC Rcd 1626, 1629, ¶ 12 (1995) (“[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications.”); *Southwestern Bell Telephone Company Transmittal Nos. 1537 and 1560 Revisions to Tariff F.C.C. No. 68*, CC Docket No. 88-180, *Order Designating Issues for Investigation*, 3 FCC Rcd 2339, 2341, ¶¶ 25, 28 (1988) (Commission rejected argument that “a credit card call should be treated for jurisdictional purposes as two calls: one from the card user to the [interexchange carrier’s] switch, and another from the switch to the called party” and concluded that “[s]witching at the credit card switch is an intermediate step in a single end-to-end communication.”).

intermediate points of switching or exchanges between carriers.”⁹ Under AT&T’s theory, a carrier could determine the jurisdiction of a call by merely routing it out of state and then back into the same state for termination. The Commission has never allowed, nor can it now allow, carriers to manipulate jurisdiction based on call routing.¹⁰ The Commission’s long determined precedent could not be clearer.

III. AT&T’s Scare-Tactics Are Nothing Short of Desperate

AT&T’s *chutzpah* to invoke the welfare of our armed forces for its own financial gain should be treated with disdain. First, it must be noted that these arguments are nothing more than after-the-fact rationalizations. As SBC has pointed out, AT&T has provided no evidence that it did not include these charges when bidding for Department of the Defense contracts—and even if it failed to include these costs, AT&T did so knowing that it would be in contravention of clear Commission rules. In truth, and as Sprint has recently demonstrated convincingly, AT&T has not provided a shred of evidence that it is doing anything other than pocketing these cost savings.¹¹

Second, while the thrust of AT&T’s Petition was that calls from these cards should always pay **inter-state** access rather than what it asserts are uneconomic **intra-state** access charges—a position which, of course, is legally inconsistent with its “information service” argument—*this argument is entirely irrelevant to the cost of providing service to military personnel serving overseas because such calls are never assessed intra-state access charges.*

If the men and women of our armed forces were truly AT&T’s concern, AT&T could simply have requested the Commission to waive these obligations for calls from prepaid calling cards distributed to military personnel. Indeed, if this is of concern to the Commission, the Commission can *sua sponte* issue such a waiver. But, of course, this argument is merely an attempt by AT&T to avert focus away from the true matter at hand – the fact that it is knowingly and improperly withholding hundreds of millions of dollars in obligatory payments.¹² If the Commission deems it to be a constructive policy to provide pricing breaks for some consumers over others, then it should address that policy head on in rules that apply to all competitors. The Commission should not, however, grant AT&T – explicitly or by Commission inaction -- the right to ignore the law

⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 & 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3695, ¶ 10 (1999).

¹⁰ See MCI Telecommunications Corporation; Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, Memorandum Opinion and Order, 57 Rad. Reg. 2d (P & F) 1573, 1582, ¶ 25 (1985).

¹¹ See *ex parte* Letter from Richard Juhnke, Vice President-Federal Regulatory Affairs, Sprint (August 2, 2004) (Sprint *ex parte*), explaining that Sprint currently distributes prepaid cards through major retailers at rates that are at the lower part of the range cited by AT&T.

¹² AT&T’s true motives also are clearly revealed by its apparent efforts to block calling cards of other carriers distributed to military personnel in Iraq and elsewhere, as detailed by Sprint. See Sprint *ex parte* at 2.

in order to increase its profits under a thinly veiled claim of helping military personnel or disadvantaged consumers.

* * * * *

Just as with IP-in-the-middle, AT&T has once again deemed it preferable to get forgiveness rather than permission. The short-term result of AT&T's scheme is to shift the burden of supporting universal service and disabilities access to telecommunications on to those carriers actually playing by the rules. It is also a certitude that competitive pressures will force other carriers to follow AT&T's lead in the absence of a clear and timely rejection of AT&T's arguments here. The pre-paid calling card market, and the toll market generally, are highly competitive and the smallest of cost advantages can provide a company with a competitive edge. This, of course, is the irony of AT&T's scare-tactics advocacy: the fact is that AT&T is complaining that if the Commission rules against it, AT&T will no longer be able to undercut its competitors that are playing by the rules!¹³ In the end, this intense competition will necessarily lead to a chaotic demise for the universal service and access funding mechanisms as other competitors conclude that the Commission's failure to act is an implicit nod that each carrier may set its own rules. While these mechanisms may well need reforming, this should come through reasoned decision-making of Congress and the Commission rather than AT&T's unilateral arbitrage actions.

For the foregoing reasons, the Commission should deny AT&T's petition and order AT&T to repay the universal service, TRS and access charge fees it has avoided through its past actions.

Sincerely,



Glenn T. Reynolds

Cc:	Christopher Libertelli	Deena Shetler
	Matthew Brill	Steve Morris
	Daniel Gonzalez	David H. Solomon
	Scott Bergmann	William Davenport
	Jessica Rosenworcel	Christopher Olsen
	William Maher	John Rogovin
	Jeffrey Carlisle	John P. Stanley
	Tamara Preiss	

¹³ As AT&T explained in its recent filing to the SEC, this unilateral decision provided AT&T with a tremendous price advantage over other providers in the extremely competitive prepaid calling card market: "savings [from failing to pay universal service and access charges] permitted AT&T to sell prepaid cards to consumers and distributors at prices below what otherwise would have been possible" (AT&T Form 10 Q).